

Original filed 8/8/06

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL L. ROBERTS,)	No. C 04-3861 JF (PR)
)	
Plaintiff,)	ORDER DENYING
)	PLAINTIFF'S MOTIONS FOR
vs.)	APPOINTMENT OF COUNSEL;
)	DENYING MOTION FOR
CALIFORNIA DEPARTMENT OF)	TEMPORARY RESTRAINING
CORRECTIONS, et al.,)	ORDER; FURTHER
)	SCHEDULING ORDER
Defendants.)	
)	(Docket Nos. 22, 32, 49)

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against the California Department of Corrections, Pelican Bay State Prison, and prison officials. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. On August 1, 2005, the Court issued an Order of Service of the complaint on Defendants California Department of Corrections; Officer T. Travis; Officer D. Luna; Officer B. Chaucer and Warden Joe McGrath. The Court dismissed the Defendant State Of California and dismissed with leave to amend Plaintiff's claims against Defendant "Does" 1-25, employees of the California Department of Corrections. Thereafter, Plaintiff filed an amended complaint naming eight additional Defendants and

1 alleging one additional claim. On February 13, 2006, the Court ordered service of the
 2 amended complaint on the additional defendants and referred this action to the Pro Se
 3 Prisoner Mediation Program. Plaintiff filed two motions for appointment of counsel, a
 4 motion for a temporary restraining order, and opposition to any out of court mediation.
 5 Defendants filed a motion to dismiss on June 19, 2006. For the reasons set forth below,
 6 the Court will DENY Plaintiff's motions (docket nos. 22, 32, 49) and issue a further
 7 scheduling order on Defendants' motion to dismiss.

8 **DISCUSSION**

9 **A. Motion for Appointment of Counsel**

10 Plaintiff has filed two motions for appointment of counsel. Plaintiff contends that
 11 appointment of counsel is necessary because he is unable to afford counsel, he is limited
 12 in litigating this case due to his incarceration, he has limited access to the law library, and
 13 limited knowledge of the law. Plaintiff maintains that the issues are complex and require
 14 significant research and investigation, therefore counsel is necessary to present evidence
 15 and to cross examine witnesses at trial.

16 There is no constitutional right to counsel in a civil case. Lassiter v. Dep't of
 17 Social Services, 452 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court only
 18 the power to "request" that counsel represent a litigant who is proceeding in forma
 19 pauperis. 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make
 20 "coercive appointments of counsel." Mallard v. United States Dist. Court, 490 U.S. 296,
 21 310 (1989).

22 The court may ask counsel to represent an indigent litigant under § 1915 only in
 23 "exceptional circumstances," the determination of which requires an evaluation of both
 24 (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate
 25 his claims pro se in light of the complexity of the legal issues involved. See Rand v.
 26 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017
 27 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of
 28

1 these factors must be viewed together before reaching a decision on a request for counsel
 2 under § 1915. See id. Neither the need for discovery, nor the fact that the pro se litigant
 3 would be better served with the assistance of counsel, necessarily qualify the issues
 4 involved as complex. Rand, 113 F.3d at 1525 (where plaintiff's pursuit of discovery was
 5 comprehensive and focused and his papers were generally articulate and organized,
 6 district court did not abuse discretion in denying request for counsel). Plaintiff's claims
 7 appear to be relatively straightforward and he has aptly presented his claims so far.
 8 Accordingly, the Court concludes that appointment of counsel is not necessary at this
 9 time. Plaintiff's motions for appointment of counsel (docket nos. 22, 49) are DENIED
 10 without prejudice.

11 B. Motion for Temporary Restraining Order

12 Plaintiff has filed an order to show cause for an injunction and motion for a
 13 temporary restraining order. In his motion, Plaintiff requests that the Court order that the
 14 Defendants are prevented from releasing Plaintiff from Administrative Segregation
 15 prematurely back into the general prison population without an adjudication of the merits
 16 of the Del Norte County pending criminal case and adjudication of his Rule Violation
 17 Report ("115 "). See Pl.'s Mot. at 1-3.

18 The Ninth Circuit has held that requests for injunctive relief may be based upon
 19 either of two sets of criteria. The "traditional" test requires the movants to: (1) establish a
 20 strong likelihood of success on the merits; (2) show the possibility of irreparable injury to
 21 the plaintiff if the preliminary relief is not granted; (3) show a balance of hardships
 22 favoring the movants¹; and (4) show that granting the injunction favors the public interest.
 23 Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1200
 24 (9th Cir. 1980).

26
 27 ¹ The district court cannot properly balance the hardships without taking into account the
 28 hardship, or lack of hardship, to the non-movants. Armstrong v. Mazurek, 94 F.3d 566, 568 (9th
 Cir. 1996).

1 The “alternative” test requires that the movants demonstrate either a combination
 2 of probable success on the merits and the possibility of irreparable injury, or that serious
 3 questions are raised and the balance of hardships tips sharply in their favor. See
 4 Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990); Alaska v. Native Village of
 5 Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988); American Motorcyclist Ass’n v. Watt, 714
 6 F.2d 962, 965 (9th Cir. 1983). These two formulations represent two points on a sliding
 7 scale in which the required degree of irreparable harm increases as the probability of
 8 success decreases. Diamontiney, 918 F.2d at 795. At the very least, however, the
 9 moving party must show a fair chance of success on the merits. Armstrong v. Mazurek,
 10 94 F.3d 566, 567 (9th Cir. 1996).

11 The Court concludes that Plaintiff has not shown sufficient facts to establish that
 12 he actually faces irreparable harm at this time. Nor has Plaintiff shown his probable
 13 success on the merits. Accordingly, Plaintiff’s motion for an injunction and temporary
 14 restraining order (docket no. 32) is DENIED without prejudice.

15 C. Further Scheduling Order

16 The Court referred the instant action to the Pro Se Prisoner Mediation Program.
 17 Plaintiff filed an objection to any out of court mediation. On July 5, 2006, Magistrate
 18 Judge Vadas filed a mediation report stating that the parties were unable to reach an
 19 agreement at the June 16, 2006 mediation. On June 19, 2006, Defendants filed a motion
 20 to dismiss specific Defendants. Plaintiff has not filed an opposition to the motion.
 21 Accordingly, the Court will grant Plaintiff an extension of time to file an opposition in the
 22 scheduling order as set forth below.

23 CONCLUSION

24 1. Plaintiff’s motions for appointment of counsel (docket nos. 22, 49) are
 25 DENIED without prejudice.

26 2. Plaintiff’s motion for an injunction and temporary restraining order (docket
 27 no. 32) is DENIED without prejudice.

1 3. Plaintiff may file an opposition to Defendants' motion to dismiss (docket
2 no. 53) with the Court and serve a copy on Defendant no later than **thirty (30) days** from
3 the date this order is filed.

4 4. Defendant shall file a reply brief no later than **fifteen (15) days** after
5 Plaintiff's opposition is filed.

6 5. The motion shall be deemed submitted as of the date the reply brief is due.
7 No hearing will be held on the motion unless the Court so orders at a later date.

8 6. All communications by the Plaintiff with the Court must be served on
9 Defendant's counsel by mailing a true copy of the document to Defendant's counsel.

10 7. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
11 Court and the parties informed of any change of address and must comply with the
12 Court's orders in a timely fashion. Failure to do so may result in the dismissal of this
13 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

14 IT IS SO ORDERED.

15 DATED: 8/8/06 _____

/s/

JEREMY FOGEL
United States District Judge

1 A copy of this ruling was mailed to the following:

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3 Michael L. Roberts
4 P-44841
5 Pelican Bay State Prison
6 P.O. Box 7500
7 Crescent City, CA 95532

8 Jennifer J. Nygaard
9 CA State Attorney General's Office
10 455 Golden Gate Avenue
11 Suite 11000
12 San Francisco, CA 94102-7004
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